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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 254

THE COMLY MANUFACTURING COMPANY and FRED E. KATZNER, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

## BRIEF IN OPPOSITION TO THE GOVERNMENT'S MOTION TO AFFIRM

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The Government's Motion to Affirm is, in effect, an argument on the merits which confesses that the undisputed facts cannot support the judgment below. It assumes that this Court will now review the entire record before the District Court and, without argument, make the findings of fact required to support

the trade practice relief. Although the execution of the license agreement and the joint enforcement of the Oppenheimer patent were undisputed on the record, there was a sharp dispute as to the defendants' alleged trade practices which the lower Court did not and could not resolve by summary procedure. The Government has not even attempted to support the provisions of the judgment attacked on this appeal by pointing to any factual conclusions of the District Court as to these practices. It makes no effort to show that either defendant made any use of these practices which was itself illegal. Instead, the Government has sought to defend this extraneous, non-patent relief by placing it under the umbrella of "the conspiracy" even though the court below in its discussion of the facts it regarded as undisputed (J. St. No. 254, pp. 7a to 17a) specifically limited the scope of the conspiracy it found to the 1938 license agreement and the defendants' actions thereunder.

There is nothing in the license agreement about slip covers other than those manufactured under the Oppenheimer patent, or about trade practices, and the Court made no mention anywhere in its opinion of the trade practices enjoined by Sections VI(A) through (E) of its decree except to note that the Government stated in its complaint that they were a part of the alleged conspiracy.

In its attempt to justify the trade practice injunctions, the Government does not cite the Court's opinion. Instead it cites correspondence from which, it claims, an inference may be drawn that these trade practices were part of the enjoined conspiracy. The Government would have this court infer from the fact that the defendants admitted the genuineness

of the documents comprising this correspondence and offered no countervailing affidavits, that the conclusions of fact which the Government sought to derive from these documents were also admitted and undisputed. Thus at pages 13 and 14 of its motion, we find a comprehensive statement of supposedly indisputable inferences which this court is now asked to draw from specified evidence not mentioned in the opinion below. The fact that these inferences are in the teeth of the evidence, (Cf. pages 13 and 18 of Comfy's Jurisdictional Statement) was recognized by the court below when it refused to draw any of these inferences in its opinion.

For example, in its Motion to Affirm, the sole exhibit in the record to which the Government could refer as the source of the supposedly undisputed fact that "the conspirators . . . made disparaging statements about competitors' products" which were "designed to, and did aid them in carrying out their conspiracy to restrain and monopolize the knitted slip cover industry" was GX 463. (M/A p. 27 and p. 14) That was a letter from Comfy's main office to one of its agents on the West Coast stating that Comfy's slip covers were of higher quality than Vatco's. The letter commences as follows:

> "Naturally, it is not a good policy to endeavor to discount another manufacturer's merchandise to build up your own. However, since you are now part of our organization I feel you are entitled to all facts pertaining to competition and need pass along to customers only information they are interested in."

There was no suggestion in this exhibit or any other document in the record that the factual comparison

made by the writer between the Vatco covers and Comfy's covers was false in any respect. There was no suggestion that Surefit was in any way connected with the sending of this letter or had any knowledge of it. Whereas the letter pointed out that Surefit had a license under the Oppenheimer patent and Vatco did not, it states that "we do not advise stressing this angle as we are primarily interested in making the finest product we know how and devoting our efforts to merchandising slip covers." The citation of this lone letter is itself an admission that there is no factual foundation in the record for paragraph VI(B) of the judgment.

Similarly, the sole record citation for the Government's assertion that "the conspirators contracted with suppliers that the latter would not sell to other manufacturers" is GX 465 (M/A p. 27 and p. 14). This document is a full-line requirements contract which Surefit had with a supplier of adjustable fasteners. Far from showing that Comfy was conspiring or cooperating or combining with Surefit, the face of the document itself shows that Comfy was one of the competitors whom Surefit was precluding from this source of supply. Yet this exhibit is the only evidence cited to justify paragraph VI(E) of the judgment. The Government is asking this Court to hold that the defendants' admission of the genuineness of this agreement constituted an admission of the truth of the factual inference which the Government sought to derive from it, i.e., that it was entered into "by conspirators" for the purpose of "carrying out their conspiracy to restrain and monopolize the knitted slip cover industry." (M/A, p. 27)

There is not a suggestion in any of the documents cited by the Government or any other evidence in the record that Comfy and Surefit even communicated with each other with regard to any of the trade practices enjoined by Section VI(A) through (E) of the Court's decree or with regard to any other aspect of selling non-patented slipcovers. The Government's exhibits do show that Comfy offered special concessions to take business away from Surefit (GX 443, 456 and 459) and that Surefit tried, where it could, to push Comfy out of other accounts (GX 420). In any event, whether the course of conduct reflected in this correspondence shows individual action whereby the defendants employed these trade practices to take business from each other, or evidences a collusive use of these practices is, at the very least, a question of fact presented on the face of the Government's own evidence. No affidavits were necessary to raise this issue.

We do not question the right of the Government's advocates to urge upon this Court in argument any version of the facts that they believe the evidence will support. We do insist, however, that the Government may not properly present its version of the facts to this Court as facts which were undisputed below. The facts which the Court below regarded as undisputed are set out in the opinion below. While that Court was relieved of the necessity of making findings as to disputed issues of fact by the summary judgment procedure, it was obliged to indicate in its opinion all of the material facts it thought were undisputed if the opinion were to serve its purpose of showing the basis for the judgment.

By arguing the facts, the Government's motion to affirm admits that the summary judgment below cannot be sustained on the face of the opinion below. If the arguments now made by the Government are to be entertained at all they should be heard upon a complete record in the District Court, where the Government's factual contentions may be tested by cross-examination of its witnesses and by countervailing proof. Only then would this Court have the benefit of the District Court's views as to the contested trade practice facts, about which the opinion below is now silent.

The extremely narrow scope of the undisputed facts belatedly receives implied recognition in the Government's motion (M/A, p. 27), where it describes the alleged conspiracy as one "to restrain and monopolize the knitted slip-cover industry" and refers to other manufacturers as being barred "from that segment of the market." While there is not and never was any such industry as the *knitted* slip-cover industry, the statement does recognize that the Government's proof showed no restraint or agreement of any kind with respect to any kind of slip-cover except the patented knitted slip-cover. If the Government had been content with relief intended to correct restraints as to knitted slip-covers the main issues presented by this appeal would not exist. However, the Court below was induced to find a conspiracy to fix the price of, and to monopolize ready-made furniture slip-covers, of which knitted covers are only one variety. There was no proof cited in the opinion below, and no attempt is made by the Government to cite any here, that knitted slip-covers were so important a factor in the ready-made field as to supply

power to monopolize it. As pointed out in our Jurisdictional Statement, there was no proof even of the relationship which knitted slip-cover sales bore to the defendant's own total sales of ready-made slip-covers, to say nothing of the industry-wide facts which would be essential to any appraisal of the importance of knitted slip-covers in the whole ready-made furniture slip-cover field.

The Government now seeks to obscure the fact that the offense actually found by the Court below was, at most, an unsuccessful attempt to gain a monopoly, by referring to that offense as a conspiracy to monopolize rather than a concerted attempt to monopolize. Regardless of the terminology used, the Government did not prove, and the Court below did not hold that the defendants had, jointly or individually, actually monopolized the ready-made furniture slip-cover field. The Government's argument about divesting the defendants of the fruits of a monopoly or prying open a market, is therefore specious except as it refers to the patent relief, and Sections VII and VIII of the decree were more than adequate to open to competitors the only kind of monopoly the defendants ever had, i.e., a patent monopoly.

The Government succeeded in persuading the Court below that once a summary decision has been made, there is no need to shape the relief to fit the offense found. Accordingly the Court made the relief as broad as the allegations of the complaint even though the evidence offered to support the general allegations as to the slip-cover business was so conflicting as to prevent any summary judgment that those allegations were true. In the part of its opinion

headed "The Facts," the Court confined the undisputed facts to the subject-matter of the defendants' license agreement of 1938 and its joint enforcement. But by the time the Court handed down its judgment seven and one-half months later, the distinction between the area of undisputed facts and the area of facts at issue had become obscured. Although the Government offered no further evidence, virtually all of the relief which it sought was then granted, both as to the alleged patent abuse and as to the alleged trade practices which had no relation to any patent or to any kind of agreement between the defendants. Instead of relying upon the Court's opinion, the Government relied upon the bare allegations of the complaint to connect the trade practice relief with the patent evidence.

What the Government is urging on this court has far-reaching and disturbing implications: In effect, it is arguing that because the defendants admitted entering into a license agreement for patented knitted slip covers which the court found on summary judgment to be in violation of the Sherman Act, and because they admitted the genuineness of a mass of other documents offered by the Government, they are not entitled to a trial of the factual issues raised by these documents as to the conduct of their unpatented slip-cover business. By this sort of fallacious reasoning, the Government succeeded below in preventing a trial which would have provided a full examination of the course of business at issue and the industry facts needed to determine what, if any, judicial surgery was appropriate.

Not content with having led the lower Court to the erroneous conclusion that the summary nature of the

judgment provided no effective limitation on the scope of the relief, the Government is now proposing a further short-cutting of the defendants' rights by trying to preclude effective appellate review. We submit that however great is the need for expediting the disposition of antitrust litigation and relieving the congestion of crowded Court calendars, it is a denial of due process to subject these defendants to severe restrictions on their ability to survive in a highly competitive business without according them the protection of a trial of disputed issues of fact, and a fortiori, without plenary review of such arbitrary action.

Respectfully submitted,

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